

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Hobart Corporation, et. al.,	:	
	:	
Plaintiffs,	:	Civil Action No. 3:13-cv-115
	:	
v.	:	Judge Walter H. Rice
	:	
The Dayton Power and Light Company, et al.,	:	Magistrate Judge Michael Newman
	:	
Defendants.	:	
	:	

**DEFENDANT THE DAYTON POWER AND LIGHT COMPANY'S
MOTION FOR LEAVE TO FILE *INSTANTER* THIRD-PARTY COMPLAINT**

Now comes Defendant The Dayton Power and Light Company ("DP&L") and hereby moves the Court, pursuant to Rule 14 of the Federal Rules of Civil Procedure, for leave to file *instante* its Third-Party Complaint (attached here as **Exhibit A**). A Memorandum in Support of this Motion is attached.

Respectfully submitted,

/s/ Drew H. Campbell

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

As the result of a diligent search, Defendant DP&L has identified several individuals and entities who own property located on or adjacent to the South Dayton Dump. (The “Site.”) As current owners or successors in interest, each is or may be liable for costs associated with the subject matter of this case.

In addition, it is DP&L’s understanding that The South Dayton Land Fill Remediation Trust was created for the sole purpose of holding assets contributed by prior owners of the Site for payment of liabilities associated with the investigation and ultimate remediation of the Site.

Because each of the proposed Third Party Defendants is or may be liable for some or all of the claims at issue in this lawsuit, their joinder now will benefit any party who may ultimately be found to bear some portion of responsibility in this, and future lawsuits.

As set forth below, their joinder is necessary for judicial efficiency and fairness to the existing parties, and will neither delay this case nor prejudice the newly-added Defendants.

II. LAW AND ARGUMENT

A. The Third Party Defendants

As the Court is aware, this is the third lawsuit that the Plaintiffs have filed to recover costs incurred in connection with their agreement to undertake remedial investigations and feasibility studies at the Site. In *Hobart I* (Case No. 3:10-cv-195), the Plaintiffs named five entities as Defendants. In *Hobart II* (Case No. 3:12-cv-213), the Plaintiffs added four more, and in *Hobart III* (Case No. 3:13-cv-115), the Plaintiffs eventually named a total of thirty-one Defendants.

Upon further investigation, DP&L identified several entities and one person who may

also bear at least some potential liability for alleged contamination at the Site.

First, it is DP&L's understanding that The South Dayton Land Fill Remediation Trust (Horace J. Boesch and Mark Fornes, as co-trustees) (the "Trust"), was created to hold assets contributed by original owners of the Site for the sole purpose of contributing to costs that might be incurred in connection with clean-up activities. DP&L further understands that the Trust has already paid a significant sum to the Plaintiffs in settlement for at least some of their activities under one or more of the ASAOCs at issue in this case. The Trust continues to hold assets that will be available for future activities at the Site. It appears that the Trust concedes at least some liability for Site-related activities, and they should be joined in this matter.

In addition, DP&L performed an extensive analysis of local property records and identified three entities and one person whose proximity to the Site may render them liable for some or all of the alleged contamination at the Site. B&D Limited Properties, Jim City Salvage, Inc., Dryden Road Investments, LLC and Ronald H. Barnett are each owners of property within the physical boundaries of the Site, as described by the U.S. EPA.

B. Third-Party Pleading Promotes Judicial Economy.

Rule 14 of the Federal Rules of Civil Procedure states, in relevant part: "A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1).

The "essential criterion" of a third-party claim is that the third-party plaintiff attempts to transfer the liability asserted against him by the original plaintiff to the third-party defendant. *Am. Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008). The third-party claim "cannot simply be an independent or related claim, but must be based upon the original plaintiff's claim against the defendant." *Id.* (citation omitted); *see Gookin v. Altus*

Capital Partners, No. 05-179-JBC, 2006 U.S. Dist. LEXIS 12980, *6–7 (E.D. Ky. Mar. 24, 2006) (citing *Moore’s Fed. Prac.*, § 14.04 (3d ed. 2005)) (“The third-party defendant’s liability must be (1) owed to the impleading party; (2) based on the underlying claim against the impleading party; and (3) derivative of the impleading party’s liability.”).

According to the United States Court of Appeals for the Sixth Circuit:

Underlying Rule 14 is a desire ‘to promote economy by avoiding the situation where a defendant has been adjudicated liable and then must bring a totally new action against a third party who may be liable to him for all or part of the original plaintiff’s claim against him.’

Am. Zurich Ins., 512 F.3d at 805 (quoting 6 Wright, Miller, Kane, *Fed. Prac. & Proc.* § 1441 at 289-90 (2d ed. 1990)). “The purpose of Rule 14 is to permit additional parties whose rights may be affected by the decision in the original action to be joined so as to expedite the final determination of the rights and liabilities of all the interested parties in one suit.” *Id.* (citation omitted).

Whether to grant a motion for leave to file a third-party complaint is in the discretion of the district court judge. “The Court considers, in part, the: (i) timeliness of the motion; (ii) likelihood of trial delay; (iii) potential for complication of issues; and (iv) prejudice to the original plaintiff.” *Am. Modern Select Ins. Co. v. Kendrick*, No. 13-245-DCR, 2014 U.S. Dist. LEXIS 91652 (E.D. Ky. July 7, 2014) (citing *Botkin v. Tokio Marine & Nichido Fire Ins. Co., Ltd.*, 956 F. Supp. 2d 795, 802 (E.D. Ky. 2013)).

C. The Court Should Grant DP&L Leave to File Its Third-Party Complaint.

1. The Third-Party Complaint Is Based on Plaintiffs’ Claims Against Defendants.

DP&L’s motion fits within the requirements of Rule 14. The Third Party Defendants’ alleged liability arises from the same nucleus of operative fact as the Plaintiffs’ main claims.

Indeed, each of the Third Party Defendants is joined because of their status as owners and/or successors in interest of property located within the boundaries of the Site. And, with respect to the Trust, its joinder arises from its status as a vehicle to contribute payment because of the admitted liability of its settlors.

As the proposed Third-Party Complaint shows, there are no new causes of action and no new injuries or sources of liability. DP&L's claims against the Third-Party Defendants is based upon, and derived from, Plaintiffs' claims against DP&L. That is the exact purpose of a Third-Party Complaint. Fed. R. Civ. P. 14(a); *Am. Zurich Ins.*, 512 F.3d at 805.

2. Granting the Motion Is in the Interests of Judicial Economy.

Judicial economy is best served if the Court grants DP&L leave to file the Third-Party Complaint. Joining third parties now “avoid[s] the situation where a defendant has been adjudicated liable and then must bring a totally new action against a third party who may be liable to him for all or part of the original plaintiff's claim against him.” *Am. Zurich Ins.*, 512 F.3d at 805 (quoting 6 Wright, Miller, Kane, *Fed. Prac. & Proc.* § 1441 at 289-90 (2d ed. 1990)). Joinder serves judicial economy by obviating the need for parallel or sequential litigation.

3. No Prejudice Results from Granting Leave to File the Third-Party Complaint.

Joining the proposed Third-Party Defendants at this stage of the lawsuit will not prejudice the original Plaintiffs, Defendants, or the new Third-Party Defendants. In fact, joining the Third-Party Defendants now is in the best interests of all parties.

The Plaintiffs will suffer no prejudice because the new Defendants represent an additional source of potential recovery. Nor will the addition of new parties substantially increase the Plaintiffs' discovery burden. Ample time remains for fact discovery under the

Court's case management order, and expert discovery has yet to begin.

Moreover, this motion is timely. It is filed shortly after DP&L completed its analysis of property owners and due diligence of the Trust. As discussed above, the Motion leaves time for the proposed Third Party Defendants to engage in meaningful discovery. Rule 30(b)(6) depositions have only just begun, and many, including the Plaintiffs' have not yet been scheduled. Documents that have been produced can be shared with any new parties easily, allowing Third-Party Defendants a full and fair opportunity to participate in additional fact discovery and, indeed, expert discovery, before liability is allocated.

For the same reasons, joinder of the proposed Third Party Defendants will not delay the trial date in this case. Indeed, the underlying activities supporting Plaintiffs' claims under the 2013 ASAOC is already complete, and the activities required under the 2016 ASAOC are in their infancy. Further, joinder of the Trust will add nothing to the discovery burden, since it is unlikely to engage in any litigation.

Finally, granting DP&L's motion for leave will not risk complication of the issues at trial. Rather, the legal issues regarding liability and allocation will remain the same, and the parties will benefit because they will be subject to one suit, and not two.

III. CONCLUSION

For these reasons, DP&L respectfully requests that the Court grant it leave to file *instanter* its Third-Party Complaint (attached at Exhibit A).

Respectfully submitted,

/s/ Drew H. Campbell

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CERTIFICATE OF SERVICE

I certify that on October 14, 2016, a true and accurate copy of the foregoing was filed electronically with the Court's ECF system, which will send notification to all attorneys registered to receive such service. Parties may access this filing through the Court's electronic filing system.

/s/ Drew H. Campbell
Drew H. Campbell